IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 138

Z. M. McCARROLL, Commissioner of Revenues of the State of Arkansas — Appellant

vs.

DIXIE GREYHOUND LINES, INC. — Appellee

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

Opinions Below

The opinions of the United States Circuit Court of Appeals for the Eighth Circuit and of the District Court for the Eastern District of Arkansas are correctly referred to in appellant's brief.

Statement as to Jurisdiction

As stated in brief of appellant, the amount of gasoline tax in controversy during each year would undoubtedly exceed the sum of $3,000.00.

With respect to the effect of the action of the Circuit Court of Appeals, and particularly with respect to that last paragraph of its opinion which is quoted, attention is called to the fact that, under the terms of the statutes in question, the tax levied upon gasoline by the State of Arkansas (Act 11 of 1934—Section 22), is purported to be levied not on each gallon of motor fuel brought into the State, but upon each gallon "sold or used" in the State or "purchased for sale or use" therein. To the same general effect is Section 25. There is no express command under the statutes in question to levy and collect this tax on all gasoline in excess of twenty gallons brought into the State; the tax is to be levied only on that gasoline "sold or used" or "purchased for sale or use" in Arkansas. It is therefore believed that the appellant has somewhat misconceived the effect of the action of the Circuit Court of Appeals. That Court, we submit, has not held these Arkansas gasoline taxing statutes generally unconstitutional and void, and has not materially affected their enforcement; it has held that where, as was admittedly the case here, the Commissioner of Revenues interpreted these Acts to require that he collect the Arkansas tax on every gallon, in excess of twenty gallons, brought into the State, regardless of whether such gasoline was or was not to be used in the State, the Acts as thus interpreted by him were or would be unconstitutional insofar as they might be considered to levy a privilege tax on gasoline not to be used on the roads of the State, and that such an application of the tax with respect to gasoline not to be used upon the roads of Arkansas would be enjoined.

STATEMENT OF THE CASE

The Evidence

The facts in this case are not a matter of controversy. They are all contained in the affidavits of two of appellee's officers, which affidavits were by stipulation accepted on the same basis as though the witnesses had testified in person; and the contents of these affidavits, together with certain allegations of fact made in the complaint and admitted in the answer, constitute what is in effect an agreed statement. It is believed that the statement of those facts by appellant is unduly brief and that it omits certain important details; therefore we here integrate, in one statement, the undisputed testimony of the two witnesses, appearing in the Record at pages 44-54.

Dixie Greyhound Lines, Inc. (sometimes herein referred to as the "Company"), is a Delaware corporation with its principal office in the City of Memphis, Tennessee, and is qualified to do business in the States of Tennessee, Arkansas, Missouri and elsewhere. Its business is the transportation of passengers by motor vehicle (R. 45). The lines operated by Dixie Greyhound Lines, Inc., or by its wholly owned subsidiary, Dixie Greyhound Lines, Inc., of Illinois, traverse or enter the States of Tennessee, Alabama, Arkansas, Mississippi, Missouri, Kentucky, Illinois and Indiana (R. 45).

Dixie Greyhound Lines, Inc., is a common carrier; and as such, it is subject to control and regulation of the public utility regulatory bodies of the various states in which it does an intrastate business, and is under the control of the Interstate Commerce Commission of the United States with respect to its interstate business wherever

carried on (R. 45). The interstate rates of this Company are under regulation of the Interstate Commerce Commission of the United States; and the purely intrastate rates of such Company, in the various states in which it operates, including the State of Arkansas, are under the regulation of the respective public utility regulatory bodies of the various states, the intrastate rates in Arkansas being under the supervision and regulation of the Arkansas Corporation Commission (R. 52, 53). Regulation of these rates is exercised by the Interstate Commerce Commission and by the state regulatory bodies in the same manner as is customary with other utilities under the supervision of those bodies (R. 53).

Dixie Greyhound Lines, Inc., owns and holds, in various states, numerous certificates of convenience and necessity and operating rights issued or granted to it by the Public Service Commissions of such states, authorizing its operation within those states (R. 46). Pursuant to certificates of convenience and necessity granted to it by the Public Service Commissions of the States of Tennessee, Arkansas and Missouri, the Company operates motor bus transportation for the carrying of passengers, baggage and light express, in both directions, over and upon the following interstate routes, among others:

(1) Between Memphis, Tennessee, and St. Louis, Missouri; traversing the streets and highways of the City of Memphis and State of Tennessee, on United States Highway No. 70 to the Tennessee-Arkansas line, and thence through Arkansas on Highway U. S. 70 to West Memphis; from this point, the route follows United States Highway No. 61 through Turrell, Osceola, Blytheville, and other towns located upon that road, to the Arkansas-Missouri

line; thence the route follows U. S. 61 through Missouri (diverting for several miles to enter the City of Caruthersville, Missouri), to St. Louis. According to the mileage log compiled and used by the Company, the distance between Memphis and St. Louis is 342.7 miles, measured along the route as the buses actually traverse it. Of this mileage, three miles are in Tennessee, 77.9 miles are in Arkansas, and the remaining 261.8 miles in Missouri.

(2) Between Memphis, Tennessee, and Blytheville, Arkansas; traversing United States Highway No. 70, from Memphis to the Tennessee-Arkansas line, and thence through Arkansas via U. S. 70 to West Memphis, and via U. S. 61 to Blytheville. Of this route, three miles are in Tennessee and 71.4 miles are in Arkansas.

(3) Between Memphis, Tennessee, and Jonesboro, Arkansas; traversing United States Highway No. 70, from Memphis to the Tennessee-Arkansas line, and thence through Arkansas via U. S. 70 to West Memphis, and via U. S. 61 to Turrell, and via U. S. 63 to Jonesboro, through the towns located upon those highways. The distance between Memphis and Jonesboro is 73 miles, of which three miles lie in Tennessee and the remaining 70 miles in Arkansas (R. 46-47).

On each of the above mentioned routes, the Company is engaged in furnishing both interstate and intrastate transportation of passengers (R. 47). The Company does not know what will be the character of the patronage offered to a bus which is about to begin a journey, until the passengers actually offer themselves and purchase tickets (R. 53). All interstate and intrastate business handled by Dixie Greyhound Lines, Inc., over any of its lines

traversing the State of Arkansas is transported in the same buses, and without distinction (R. 53). It is not practicable, from an operating point of view, to furnish separate buses or accommodations for interstate or intrastate passengers, or to divide the transportation of the two types of business (R. 53, 54). Interstate passengers very greatly predominate in importance, numbers and percentage of ticket sales (R. 47).

The motor buses used by the Company in the transportation of its interstate passengers, baggage and express, are propelled by gasoline motors (R. 47). The Company is a large user of gasoline in its transportation operations, having purchased and consumed in such operations, 1,259,401 gallons during the year 1935 (R. 47). The cost of such gasoline at the refinery, and the transportation charges and taxes paid thereon, constitute one of the principal elements in the total cost of furnishing transportation (R. 47). It has been found, by the Company, through experience, that the only economical, safe, practicable and reliable method of obtaining and handling gasoline requires the maintenance by the operating company of storage facilities capable of accommodating gasoline in carload or bargeload quantities; because gasoline may be purchased in such quantities direct from the producers at a lower cost than would be paid by the public for small quantities, and such economy in purchasing is sufficient to materially lower the final transportation cost to the public (R. 47). It is desirable as an operating proposition that such storage facilities be not more numerous than necessary, because of the expense of installation and maintenance of facilities, and the cost of acquiring or leasing sites for the location of such storage,

all of which expenses become a part of the final transportation cost (R. 47). It is necessary that such storage facilities should be located at strategic points, with reference to the routes traversed by the motor buses; and where such strategic locations also have water transportation available the saving in transportation charges is increased, by reason of the fact that water transportation is cheaper in itself, and because the availability of water competition tends to reduce the competitive railroad rates (R. 47, 48). It is, therefore, particularly necessary that, wherever circumstances permit, storage facilities should be set up where water transportation is available (R. 48). It is further necessary to efficiency that the Company should exercise supervision over the quality and grade of the gasoline used by it, and should see that such gasoline is not only of the proper grade, but also uniform; because, variations of grade and type of gasoline cause an important increase in cost in the course of a year, in the case of a motor carrier of the type of the appellee, operating in excess of six million miles per year (R. 48). It is impracticable, from an accounting and operating point of view, to permit the casual purchase of gasoline for the use of a bus in the course of a journey (R. 48).

Variations from proper operating practices have the effect of increasing the cost of motor fuel, and ultimately increasing the cost of transportation furnished; and such variations also adversely affect the regularity, safety, reliability and convenience of such transportation (R. 48). The casual purchase of fuel along the roadside at retail creates delays; while the carrying in the tanks of the buses of insufficient quantity of gasoline is likely to result in an increased number of road failures (R. 48). Either of

the above alternatives would tend to increase the cost of the transportation; and to affect the passengers with increased cost, and with the inconvenience, annoyance and loss due to incidental roadside delays and trouble, and loss of connections at destinations (R. 48). Such irregularity and lack of convenience in transportation would cause damage to appellee itself, through loss of business and good will resulting from inferior service, and would further subject the Company to risk of loss of its certificates of convenience and necessity and operating rights by reason of failure to operate upon the same in a proper and convenient manner (R. 48).

The filling of gasoline tanks in buses at roadside filling stations, in a casual manner, also constitutes a risk to the passengers on such bus, because of the inherent danger of handling gasoline and the hazard of fire caused by static electricity (R. 48, 49). Because of such danger, the Company makes it a rule to fill the tanks of its buses only at times and places when there are no passengers in the bus (R. 49).

With particular reference to its operations between Memphis and St. Louis, and between Memphis and Jonesboro, Arkansas (which routes include all of its operations within the State of Arkansas), the Company maintains major gasoline storage facilities at Memphis, Tennessee, and St. Louis, Missouri (R. 49). Each of these cities offers water transportation, and is strategically located with respect to the routes traveled by the appellee's buses (R. 49). In April, 1934, the Company maintained storage facilities at Caruthersville, Missouri, which is also a river point, but these facilities were found to be uneconomical, and are not being used at this time (R. 49). If it were

found necessary to resume their use, such use would have the effect of increasing the operating cost, and consequently the cost of transportation (R. 49). While it is physically possible for the Company to create and maintain gasoline storage facilities within the State of Arkansas, from an operating point of view it is uneconomical to set up such facilities at any point within such State (R. 52). There is no point within the State of Arkansas, on any of the routes traversed by the Company within that State, which offers advantages for the efficient purchase and storage of gasoline, or where the acquisition or maintenance of storage facilities would not be a useless expense and a waste of the money involved (R. 49).

At this time, all of the buses of the Company operated between Memphis and Jonesboro, and Memphis and St. Louis, will run approximately five miles for each gallon of gasoline consumed (R. 49). The Company is accustomed to put into the tanks of its Memphis to Jonesboro buses, and into its Memphis to Blytheville and Caruthersville local buses, an amount of gasoline sufficient to transport the bus to its destination and return, with a reasonable margin for safety (R. 49, 50). In April, 1934, the Company was accustomed to send out its Memphis to St. Louis buses with a quantity of gasoline in the tank sufficient to carry the bus to Caruthersville, where the supply was renewed for the remaining journey to St. Louis; and the St. Louis to Memphis buses were filled at St. Louis (R. 50). At the present time, however, tanks are filled in Memphis and St. Louis (R. 50).

At this time, those motor buses operated by Dixie Greyhound Lines, Inc., from Memphis into and through the State of Arkansas, are accustomed to reach and enter the

State of Arkansas, whether from Memphis or from St. Louis, with an amount of gasoline in the tanks of such buses exceeding twenty gallons (R. 51). It is necessary, from the operating point of view, that more than twenty gallons of gasoline be in such tanks when the buses reach the State of Arkansas because such buses cannot operate from Memphis to Jonesboro and return upon twenty gallons of gasoline and, while such buses can actually traverse the State of Arkansas on the route between Memphis and St. Louis, without expending an entire twenty gallons, such twenty gallons are insufficient to carry the bus the entire distance between Memphis and Caruthersville, Missouri, at which two points storage facilities are available (R. 51, 52).

As of the date of the affidavit proof, gasoline was selling at the refineries for five cents per gallon, to which cost should be added freight to the point of storage (R. 50). Rail freight from Oklahoma points to Memphis (with respect to which particular freight transportation Memphis has no shipping advantage over other points in its immediate vicinity) is $.0218 per gallon (R. 50, 53). The freight rate on gasoline from New Orleans to Memphis by rail or water is $.15 per hundred pounds, which is equivalent to ninety-nine one-hundredths ($.0099) cents per gallon (R. 53). The freight rate by rail from New Orleans to both Jonesboro and Blytheville, Arkansas, is twenty-six and one-half ($.265) cents per hundred pounds, or one and three-quarters ($.0175) cents per gallon (R. 53).

The Company pays to the State of Tennessee a tax of seven ($.07) cents per gallon, and an additional inspection fee of four mills per gallon, on all gasoline placed by it in storage facilities at Memphis, Tennessee, regardless

of whether such gasoline is used in the State of Tennessee or not, the fact of storage in that State making such gasoline liable for this tax (R. 50). The Company also pays to the State of Missouri a tax of three ($.03) cents per gallon on all gasoline placed by it in storage in its facilities in that State, whether such gasoline is used in the State of Missouri or not (R. 50). All gasoline which is carried into the State of Arkansas in the tanks of motor buses owned by Dixie Greyhound Lines, Inc., has been taxed by, and the tax paid to, either the States of Tennessee or Missouri (R. 50).

Caruthersville, Missouri, the first river point north of Memphis on the Memphis-St. Louis bus route, is 105.2 miles distant from Memphis, according to the mileage log of the Company, which mileage log is compiled from mileage readings taken over the actual route which the buses traverse, and which route includes the distance covered in traveling through cities and off the main highways to serve points not located upon such highway (R. 50).

At the time of the hearing, the Company was operating two scheduled trips daily in each direction between Memphis and Jonesboro, Arkansas; three scheduled trips daily in each direction between Memphis and St. Louis; two scheduled trips daily in each direction between Memphis and Blytheville; and one scheduled trip daily in each direction between Memphis and Caruthersville, Missouri (R. 51).

Buses operated by the Company between Memphis and Blytheville, Arkansas, and Memphis and Jonesboro, Arkansas, are afforded time after their arrival at their respective termini and prior to beginning a return trip

over the route, and before passengers are permitted to enter the bus, to refill gasoline tanks at those points, if and provided the Company had available facilities for storing or obtaining gasoline at Blytheville or Jonesboro (R. 52). If Company storage facilities were maintained at Blytheville and Jonesboro, the gasoline available to the buses at those points could be controlled as to quality, etc., as is the gasoline available at Memphis or other major storage points; but if such gasoline were obtained at Blytheville or Jonesboro, from outside parties, such control would not be practicable (R. 52).

Motor cars designed for pleasure use generally have a gasoline tank capacity of less than twenty gallons; while commercial equipment of more than the smallest size is habitually equipped with gasoline tankage holding in excess of twenty gallons, the actual capacity varying with the type of equipment for which it is designed (R. 50, 51).

In no single instance can the buses of Dixie Greyhound Lines, Inc., run from Memphis to their termini and return, or from Memphis to the nearest gasoline storage facilities of the Company, on twenty gallons of gasoline (R. 51).

In addition, it is to be taken as a fact, because alleged in the bill and admitted in the answer (R. 10 and 20), that demand is being made upon Dixie Greyhound Lines, Inc., by the Commissioner for payment of Arkansas gasoline tax on all gasoline in excess of twenty gallons brought into the State in the tanks of its buses, under threat of the penalties provided by the Acts in question.

SUMMARY OF ARGUMENT.

I. If Act 11 of 1934 is construed and applied in such manner as to impose the tax upon every gallon of gasoline, in excess of twenty gallons, brought into the State of Arkansas in the fuel tanks of vehicles in the course of transporting passengers in interstate commerce, without regard to whether such gasoline is used or to be used within that State, the tax so imposed constitutes a direct burden upon an instrumentality of interstate commerce and therefore upon such commerce itself and, to the extent that it is purported to be levied upon gasoline used or to be used on the highways of other states, is void because in conflict with the Commerce Clause of the Federal Constitution.

II. The exception to the above stated general rule, that a state may levy a privilege tax upon an interstate carrier as compensation for the privilege of use of the highways of the state, has no application in this case; because such a privilege tax for the use of the highways may be levied only as compensation for such use and must bear some reasonable relation to the use of the highway, and the tax as herein sought to be imposed bears no relation whatever to such use.

III. Assuming the validity of Act 11 of 1934 under the Commerce Clause of the Federal Constitution, the result reached by the Circuit Court of Appeals is correct and its decree should be affirmed, because the application of the tax to every gallon of gasoline in excess of twenty gallons, brought into the State in the tank of any vehicle, is contrary to the express terms of the Act itself, which

limits the tax to gasoline brought into the State for sale or use therein.

IV. With particular reference to the argument on behalf of the appellant:

1. The tax here levied is in fact not a privilege tax levied as compensation for the privilege of using the highways of Arkansas, and is therefore void as against this interstate carrier.

2. Act 67 of 1933, if otherwise invalid with respect to gasoline not to be used on the roads of Arkansas, is not to be supported on the ground of necessity or convenience.

3. The Circuit Court of Appeals was correct in its appraisal of Interstate Transit, Inc., v. Lindsey.

4. Bingaman v. Golden Eagle Western Lines, is not a controlling authority in this case.

ARGUMENT

I. The Tax, as Imposed, Constitutes a Direct Burden Upon Interstate Commerce.

It is our basic contention that these Arkansas gasoline tax statutes, if construed to impose the State tax upon every gallon of gasoline in excess of twenty gallons brought into that State in the tanks of motor vehicles while engaged in interstate journeys, and without regard to whether such gasoline thus sought to be taxed is to be used within the State of Arkansas or not, impose a direct burden upon interstate commerce and are therefore in conflict with the Federal Commerce Clause.

The fact that a burden is here imposed upon interstate commerce, and that such burden is direct, appears almost too clear for argument. The appellee is shown without dispute to operate within the State of Arkansas over certain specific and certificated routes. These routes are: From Memphis, Tennessee, into and through Arkansas, and thence to St. Louis, Missouri, and return, over United States Highway No. 61; and from Memphis, Tennessee, to Jonesboro, Arkansas, and return, over United States Highways Nos. 61 and 67 (R. 46, 47). All of the motor buses of appellee which enter the State of Arkansas on these routes are interstate carriers, and most of the passengers carried are on interstate journeys (R. 47).

The Commissioner, in demanding payment of the gasoline tax on each gallon, above twenty gallons, in every tank, merely because it is *brought into the State* and without any regard to whether it is to be used in Arkansas, says to the appellee, in effect, that it has the choice between (1) entering the State in every case with less

than twenty gallons, (2) paying the tax on all over twenty gallons, regardless of place of use, or (3) being arrested and fined. Each one of these alternatives, even the third one, involves a burden upon interstate commerce.

If the Company elects to enter Arkansas with less than twenty gallons in each tank, it is in undisputed evidence (R. 51) that "*in no single instance can the buses of the Company run from Memphis to their termini and return, or from Memphis to the nearest gasoline storage facilities of the Company, on twenty gallons of gasoline.*" Such a condition will of course result in the buses running out of gasoline on the highways in the course of their journeys unless (1) storage facilities are set up in Arkansas, or (2) gasoline is bought en route. It is in evidence without dispute that storage facilities in Arkansas are unnecessary for any other reason, are expensive and wasteful, and that gasoline prices therein would be higher because of higher freight rates; and it is further in evidence that casual purchase of gasoline along the way is impractical, inefficient, expensive and dangerous. Necessarily, then, any attempt by the Company to adopt the first alternative, and to enter the State with less than twenty gallons in tanks, must result in a burden upon the interstate operation, either by creating delay, inconvenience and hazard to the passengers, or by increasing the cost of transportation which the passenger must ultimately pay.

If the Company adopts the second alternative and elects to pay the tax on all over twenty gallons (otherwise conducting its operations in a normal and efficient manner), the existing cost of the interstate transportation is directly increased by the addition of the tax thus collected, and interstate commerce is to that extent directly burdened.

Even should the Company elect to refuse payment on gasoline over twenty gallons, its vehicles will be stopped and fines imposed, thereby creating direct inconvenience to the traveling public, and increased expense to the Company, which expense becomes part of the cost of service.

Thus, *no matter what the Company may do in the face of the demand made on it by the Commissioner, interstate commerce will be burdened.* If the Company pays the tax demanded, it certainly goes without saying that the burden is direct; the tax is simply added to present costs. And, as appears above, even the attempt to avoid this burden results in other direct burdens, in the form of immediate inconvenience, danger or ultimate expense to the interstate passenger.

It is, of course, fundamental that regulation of interstate commerce is a matter for Congress exclusively; this Court has said, in *Leloup v. Port of Mobile*, 127 U. S. 640, at 648, 32 L. Ed. 31, S. Sup. Ct. 1380, that

> "*No State has the right to lay a tax on interstate commerce in any form*, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress." (Emphasis ours.)

This power vested in Congress embraces within its control all the instrumentalities by which interstate commerce may be carried on. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. 826. These

principles are settled, and multiplication of authority would serve no useful purpose; but other well known cases are:

Phil. & Read. R. Co. v. Pennsylvania, 82 U. S. 177, 21 L. Ed. 146;
Ozark Pipe Line v. Monier, 266 U. S. 555, 69 L. Ed. 439, 45 Sup. Ct. 184.

It has been held in the case of *Helson v. Kentucky*, 279 U. S. 245, 73 L. Ed. 683, 49 Sup. Ct. 279, that any tax, exacted as the price of the privilege of using an instrumentality of interstate commerce, is invalid. That case, which involved a Kentucky statute levying a tax on gasoline used in the State, bears a striking resemblance to the case at bar in the practical situation surrounding the controversy. The plaintiff operated a ferry boat across the Ohio River between Illinois and Kentucky points. The State of Kentucky undertook to impose its tax upon gasoline bought in Illinois and used in propelling the ferry boat across the river in its interstate journeys. In declaring such tax void as so applied, this Court says (at 252):

"The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat would represent an exact parallel. And is not the fuel used in propelling the boat an instrumentality of commerce no less than the boat itself? *A tax which falls directly upon one of the means by which commerce is carried on directly burdens that commerce.* If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than a

repetition to say that such a tax *cannot be laid upon the use of a medium by which such transportation is effected.*" (Emphasis ours.)

The applicability of the Helson case to the case at bar is obvious. In each instance the State meets the carrier as it crosses the State line in the course of an interstate journey, and threatens that unless a tax is paid on the gasoline contained in and being used to propel the interstate vehicle, certain penalties will be imposed. Disregarding for the moment the condition that the bus enters the State on a public highway, rather than a navigable river (the effect of which variation will be hereafter considered), the Helson case would appear to establish that the imposition of a gasoline tax on fuel contained in and propelling a vehicle engaged in an interstate journey is a tax upon the means by which commerce is carried on, which in turn constitutes a direct burden upon the commerce itself.

In the progress of this case through the two lower courts, there has been so much misconstruction by the Commissioner of our use of the Helson case that we trust the Court will pardon what may be a laboring of our point with respect to that decision.

In the view of the appellee, the Helson case, by reason of the very close and practical analogy between its facts and those of the case at bar, establishes definitely and beyond question the legal proposition that *the attempted assessment of a tax upon gasoline, as the same is being brought into the State in a fuel tank of an interstate carrier, is a burden laid directly upon an instrumentality of interstate commerce, which in turn is a direct burden*

upon the commerce itself. In view of the Helson case, *the Commissioner cannot claim that this tax on gasoline is not in fact a burden on interstate commerce; and he cannot claim that the burden is not direct.*

There are certainly matters to be considered in this cause beyond the scope of the Helson case; there is the further question of whether the Commissioner can support this tax as coming within any exception to the "general" rule that a State may not directly burden interstate commerce. But, after having hereafter discussed that possible exception and shown that it has no application here, we may again revert to the Helson case *as the decision which unquestionably makes that general rule fully applicable to our particular facts.*

The appellee naturally does not contend that all interstate commerce is to be completely exempt from all forms of taxation; there are numerous taxes which have been declared lawful, but which ultimately affect interstate commerce in some degree, or increase the cost of the business thus being carried on. This situation has recently been reviewed by this Court in the case of *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 82 L. Ed. 823, 58 Sup. Ct. 546. After first referring to certain types of taxes that have been approved, the Court goes on to say (page 255):

> "All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. *The vice characteristic of those which have been held invalid*

is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed, Fargo v. Stevens, Michigan, 121 U. S. 230, 7 S. Ct. 857, 30 L. Ed. 888; Philadelphia & S. M. S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200; Galveston, H. & S. A. R. Co. v. Texas, supra; Meyer v. Wells, Fargo & Co., 223 U. S. 298, 32 S. Ct. 218, 56 L. Ed. 445, *or added to,* Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295; Fisher's Blend Station, Inc., v. State Tax Commission, 297 U. S. 650, 56 S. Ct. 608, 80 L. Ed. 956, *with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.* See Philadelphia & S. M. S. S. Co. v. Pennsylvania, supra, 122 U. S. 326, 346, 7 S. Ct. 1118, 30 L. Ed. 1200; State Freight Tax, 15 Wall. 232, 280, 21 L. Ed. 146; Bradley, J., dissenting in Maine v. Grand Trunk Railway Co., 142 U. S. 217, 235, 12 S. Ct. 121, 163, 35 L. Ed. 994. Cf. Pullman's Palace-Car Co. v. Pennsylvania, supra, 141 U. S. 18, 26, 11 S. Ct. 876, 35 L. Ed. 613. *The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove.* Baldwin v. G. A. F. Seelig, 294 U. S. 511, 523, 55 S. Ct. 497, 500, 79 L. Ed. 1032, 101 A. L. R. 55.

"It is for these reasons that a state may not lay a tax measured by the amount of merchandise carried in interstate commerce, State Freight Tax, supra, or upon the freight earned by its carriage, Fargo v. Stevens, supra; Philadelphia & S. M. S. S. Co. v. Pennsylvania, supra, restricting the effect of State Tax on Railway Gross Receipts, 15 Wall. 284, with which compare Miller, J., dissenting in that case at page 297, 21 L. Ed. 164. Taxation measured by

gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 24 S. Ct. 107, 48 L. Ed. 229; Maine v. Grand Trunk Railway, supra; Cudahy Packing Co. v. Minnesota, supra; United States Express Co. v. Minnesota, 223 U. S. 335, 32 S. Ct. 211, 56 L. Ed. 459, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair, Fargo v. Michigan, supra; Galveston, H. & S. A. R. Co. v. Texas, supra; Meyer v. Wells, Fargo & Co., supra, with which compare Wisconsin & M. R. Co. v. Powers, supra. Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in Maine v. Grand Trunk Railway, supra; Ficklen v. Shelby County Taxing District, supra; American Manufacturing Company v. St. Louis, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084, or as a method of arriving at the fair measure of a tax substituted for local property taxes, Cudahy Packing Co. v. Minnesota, supra; United States Express Company v. Minnesota, supra; cf. Postal Telegraph Cable Co. v. Adams, supra; see McHenry v. Alford, 168 U. S. 651, 670, 671, 18 S. Ct. 242, 42 L. Ed. 614, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on. A tax on gross receipts from tolls for the use by interstate trains of tracks lying wholly within the taxing state is valid, New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 15 S. Ct. 896, 39 L. Ed. 1043; cf. Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 17 S. Ct. 532, 41 L. Ed. 953, although a like tax on gross receipts from the rental of railroad cars used in interstate commerce both within and without the taxing state is invalid. Fargo v. Michigan, supra.

In the one case the tax reaches only that part of the commerce carried on within the taxing state; in the other it extends to the commerce carried on without the state boundaries, and, if valid, could be similarly laid in every other state in which the business is conducted." (Emphasis ours.)

The language emphasized is pertinent to the practical conditions of the case at bar; and the anticipated evil, to which that language was directed is potentially present here. That evil is the possible levy by any and every state of the same tax upon the same interstate commerce. In the case at bar, gasoline, while in actual use in interstate commerce and in such use held to be an instrumentality of such commerce, is sought to be taxed *if merely brought within the taxing State*, and without regard to its use there or elsewhere. If such a tax can lawfully be imposed by Arkansas, it can be imposed by every other State through which the vehicle may pass. This will give rise to a situation wherein the same instrumentality of commerce may in theory be taxed by all forty-eight states, and where in practice it will be taxed by enough of those states to increase many times its cost as an element of transportation expense. To visualize what can and undoubtedly will happen, one has only to recall the great number of states, especially in the northeastern section of the country, whose borders would be crossed by a motor carrier operation no longer than that conducted by the appellee between Memphis and St. Louis. To give only one example, the distance is about the same as that from New York City to Richmond over Highway U. S. No. 1; the latter operation would involve six states and the District of Columbia. We therefore submit that the tax on this instrumentality of commerce contended for

by the Commissioner is a perfect example of that cumulative burden to which the Court has referred.

Then, assuming appellee's proposition, that the imposition of this tax in the manner demanded by the Commissioner is an actual, direct and prospectively cumulative burden on interstate commerce, is that tax to be saved from consequent invalidity on the ground that it is a privilege tax levied upon the interstate carrier for the privilege of use of the State's highways?

II. The Tax Is Not to Be Supported as a Privilege Tax for the Use of the State Highways.

It is recognized that the State may impose upon an interstate carrier a privilege or license tax as compensation for the privilege of using the highways of the State. This exception to the more general rule that a State may not impose a tax directly burdening interstate commerce, has been the essence of the Commissioner's case to the present time, and has consistently been urged by him, but always without reference to those very definite conditions which must be present before even such a privilege or license tax can meet the tests of validity laid down by this Court.

As we conceive it, the rule is that, while a State may levy upon the interstate carrier a privilege or license tax, which is a direct burden upon interstate commerce, for the privilege of using the highways of the State, such a tax may be levied *only as compensation for the use of such highways, must bear a reasonable relation to the use of those highways, and must be predicated upon the use made or to be made thereof. There must be such a*

relation between the measure employed and the extent or manner of use as to justify the conclusion that the tax is a charge made merely as compensation for the use of the highways.

The above is the rule established by this Court in the case of *Interstate Transit, Inc., v. Lindsey*, 283 U. S. 183, 75 L. Ed. 953, 51 Sup. Ct. 380. The State of Tennessee had there imposed a privilege tax upon interstate buses, graduated according to passenger-carrying capacity. In holding that tax invalid, this Court said :

> "As such a charge is a direct burden on interstate commerce, *the tax cannot be sustained unless it appears affirmatively in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic.* This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551, or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, supra, or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. Hendrick v. Maryland, 235 U. S. 610, 612, 35 S. Ct. 140, 59 L. Ed. 385; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 250-252, 48 S. Ct. 230, 72 L. Ed. 551. Compare Interstate Busses Corp. v. Holyoke Street Ry., 273 U. S. 45, 51, 17 S. Ct. 298, 71 L. Ed. 530. *But the mere fact that the tax falls upon one who uses the highway* is not enough to give it presumptive validity." (P. 186.)
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> "But since a state may demand of one carrying on an interstate bus business only fair compensation for

what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. *Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the state.* Clark v. Poor, supra. In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage traveled, or even with the number of passengers actually carried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses." (P. 190.) (Emphasis ours.)

This Court has since reaffirmed the proposition that, to justify a money payment burdening interstate commerce, it must affirmatively appear that the payment is demanded as reimbursement for the expense of providing facilities, etc. *Morf v. Ingels*, 300 U. S. 290, 81 L. Ed. 653, 57 S. Ct. 439. The Lindsey case has also been cited with approval in *Aero Mayflower Transit Co. v. Georgia Commission*, 295 U. S. 285, 289, 79 L. Ed. 1439, 55 Sup. Ct. 709, and in *Morf v. Bingaman*, 298 U. S. 407, 410, 80 L. Ed. 1245, 56 Sup. Ct. 756.

It appears, therefore, to have been established that a State may not impose such privilege taxes, which are a direct burden on interstate commerce, and justify them as being compensation for the use of the highways, "unless it appears affirmatively" that the tax is levied *only*

as compensation, that the charge made is predicated upon the use made, and that such charge bears a reasonable relation to the use.

The Circuit Court of Appeals took the position that this case is ruled by Interstate Transit, Inc., v. Lindsey (R. 71), and we submit that the Court of Appeals was entirely correct in that view. In the light of the rule laid down in that case, *it does not matter whether the tax here in question is or is not a privilege tax for the use of the highways; because, even if it is such a tax, there is absolutely no relation whatsoever between the tax collected and the use to be made of the highway, and the tax is not predicated on such use.*

Consider the practical situation. The State of Arkansas meets the interstate carrier at the State line and demands that it pay 6½ cents tax on every gallon of gasoline in excess of twenty gallons then contained in the tank. It does not matter how large or small the vehicle may be, nor how heavy or light, nor whether it is traveling a great or short distance. In the entire transaction, the extent of the carrier's use of the roads *will not even be asked.* The only single fact that counts at all, in fixing the amount collected for the alleged "use," is the number of gallons in the tank; the sum thus collected bears no relation whatsoever to the use of the roads, either as to distance traveled or weight damage inflicted. The same vehicle, with the same number of passengers or the same freight, traveling the same road to the same destination on successive days, may pay an entirely different sum. The appellee's own buses are called upon to pay one rate of tax while going north from Memphis to St. Louis, but another rate of tax when the very same bus travels south from St. Louis to

Memphis over the same identical stretch of highway; not because of any difference in use of the road, but merely because the St. Louis-Memphis bus has consumed more fuel in reaching the Arkansas State line. The careful operator, coming into the State with contents of his tank closely gauged to the work in hand, will make liberal use of the Arkansas roads, and pay little or nothing; but some person ignorant of the law may blunder across the State line with a full tank, on a trip of perhaps a few miles, and be assessed on the entire contents of his tank over twenty gallons, when nearly all of those contents will be carried out of the State again, unused. And that same person, wiser by experience, can return with the same vehicle into the State the next day, and operate over the same route, but pay nothing. The State does not ask where he is doing, or how large or heavy his vehicle may be; the State does not care whether the actual use of its roads be great or small. It asks the operator just one question: "How much in your tank?" If there is much, you pay much; if there is little, you pay little (or nothing). Yet the destination and vehicle may be the same in each case, or the man with the light tank may be traveling much farther. As if to render the confusion more complete, the State exacts this tax, "levied as compensation for the use of the roads," upon industrial and non-transportation users of gasoline; and adds *discrimination* to chaos by exempting as a class all pleasure vehicles (whose tanks hold less than twenty gallons) while demanding the tax of commercial users. *The whole thing is completely haphazard, and in no manner whatever related or apportioned to the degree of use to be made of the highway.*

If the State, in the collection of this gasoline tax, does not even ask or need to know whether the fuel on which it levies is to be used on its roads or not, how can it be said that the tax is "predicated" on such use? If this tax is predicated on any use of highways, then the State, as the Court of Appeals points out (R. 73), is imposing a tax, not only upon the interstate commerce carried on within its own borders and over its own roads, but even upon such commerce carried on within other states to which this gasoline is carried in the course of the interstate journey.

We emphasize that in the discussion of the application of the Lindsey case we have assumed, as the Circuit Court of Appeals assumed without deciding, that the Arkansas statutes purport to impose a privilege tax for the privilege of using the highways. That is the utmost which the Commissioner can claim. Even with that assumption, we have a tax which is actually a burden on interstate commerce, and which cannot be defended as compensation demanded from an interstate carrier for use of the roads, because the tax has no relation whatever to such use. We submit, therefore, that assuming the strongest ground which the Commissioner can take, the action of the Circuit Court of Appeals was correct.

III. The Application of the Tax to All Gasoline Brought Into the State Is Contrary to the Express Terms of the Statute Itself.

In the discussion of this topic, we disregard all that has heretofore been said, and assume that the tax is not invalid as in conflict with the Commerce Clause. Nevertheless, though the State be conceded to have the power

which the Commissioner claims, the State has not purported to exercise such power, and has not authorized, even in the terms of its statutes, the position taken by the Commissioner. Hence the action of the Circuit Court of Appeals (though not based on such proposition, which that Court had no reason to consider), is nevertheless correct.

As a preliminary to our discussion of the terms of the statutes themselves, we here set out for convenience all of the provisions of Act 11 of 1934 which appear to have any bearing on this question. Act 67 of 1933 is of no assistance in this respect. It simply prohibits bringing gasoline into the State until the "tax" thereon has been paid, without purporting to say what the "tax" may be; the actual "tax" is defined and levied by Act 11 of 1934.

Act 11 of 1934 contains the following provisions, wherein we emphasize the pertinent language:

"Section 22. Paragraph (c) of Section 1 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

"'*There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel* as defined in this Act, sold or *used in this State* or purchased for sale or *use in this State.*'"

"Section 25. Section 2 of Act No. 63 of the General Assembly approved February 25, 1931, is amended to read as follows:

"'Section 2. The purpose of this Act is to provide for the payment and collection of an excise or privilege tax on the first sale of motor vehicle fuels when sold, *or the use, when used in this State;* double taxation is not intended. Motor vehicle fuel manufactured, produced or compounded in or imported into this State and subsequently sold for exportation, is not taxable.

"'The tax herein levied is to be collected at the source in this State of the manufacturer or wholesaler when sales of any motor vehicle fuels are made, and when not sold in this State, then when first brought into this State *for use herein*. Provided that notwithstanding any provision or provisions contained in this Act to the contrary, no person, firm or corporation who manufactures motor vehicle fuel in this State from crude oil and its derivatives shall be required to pay or collect the tax imposed by this Act on any such motor vehicle fuel that said person, firm or corporation sells and ships to the purchaser in a railway tank car. This provision, however, shall not relieve any person, firm or corporation from making reports to the Commissioner of Revenues showing the amount of motor vehicle fuel sold in railway tank cars, and the tax upon such motor vehicle fuel so shipped in railway tank cars shall be collected and paid by the person, firm or corporation which purchases the motor vehicle fuel which is shipped in a railway tank car.'"

"Section 27. Nothing in this Act or in any similar law on the subject shall be construed as intending to levy any tax on motor vehicle fuel that the State has no power to tax."

"Section 28. The tax of six and one-half cents per gallon herein provided for is levied and shall be collected, under such rules as may be promulgated by the Commissioner of Revenues for ascertaining the quantity of such motor vehicle fuel, on all motor vehicle fuel purchased in other states and *used in this State* in propelling motor vehicles on the public highways moving in interstate or foreign commerce in all instances *where such tax is not a burden on such interstate or foreign commerce* and such tax may be lawfully collected by this State." (R. 7-8.)

In discussing the construction of these Acts, we premise both a legislative intent and a constitutional power to tax

gasoline thus brought into the State in interstate buses, and confine ourselves to a consideration of the extent to which the Legislature intended such a tax to go. There is no Arkansas decision on this point, to the best of our knowledge; the question of interpretation is open. We desire to note that consideration of this question should be had in the light of the well recognized rule that "in the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen." Gould v. Gould, 245 U. S. 151, 62 L. Ed. 211, 38 Sup. Ct. 53.

Observe that (Section 22) the tax is an excise on the *sale or use in the State;* the purpose of the Act (Section 25) is stated to be the collection of the tax on the *use, when used in the State;* and such tax (Section 28) is to be collected on gasoline bought in other States and "*used in this State in propelling vehicles on the public highway*" in interstate commerce, *provided there is no burden on such commerce.* Wherever *use* is spoken of, it is *always* coupled with the qualification "in the State." Section 28 is particularly clear. It speaks of gasoline "used *in this State* in propelling motor vehicles." In other words, this clearly indicates that by "use" the Legislature meant the ultimate purpose for which gasoline (as motor fuel) is intended, viz., exploding in a motor to furnish power.

Gasoline is not *used* by being carried about in a tank, any more than a lump of coal in a railroad engine tender

is *used* by being carried over the railroad. It is no more *used* in this sense than it is used while still piled in the coal yard. Such coal or gasoline is *ready* for use, but it is not *used*, and does not perform the function for which it was purchased, until it gives up its power in the form of heat. Such is the common sense meaning of "use," as applied to gasoline; and we submit that nothing in this Act points to any different meaning in the legislative mind.

The Commissioner, arguing for a legislative intent to extend this tax to all gasoline in fuel tanks, without regard to place of use, necessarily admits that the Legislature must then also have intended the existence of all of those anomalies and absurdities in the incidence of the tax, which we have already in this brief pointed out. If the Legislature intended to tax all gasoline regardless of place of use, then it must also have intended such freakish results as that a small truck with twenty-five gallons in the tank may traverse the whole width of the State for a tax of $0.32, while a vehicle with ninety gallons aboard may not run from Memphis to West Memphis and return (20 miles) without paying $5.45 for this doubtful privilege.

Certainly, in an Act which cannot stand at all against interstate carriers except as an attempt to collect compensation for the use of the highways, the Legislature may not reasonably be considered as intending to produce anomalies which, by their very existence, would expose the tax to great danger of complete invalidity.

It is submitted that, even if the tax be constitutional, the Commissioner's position is indefensible under the terms of the statutes, and that the action of the Circuit Court of Appeals is to be affirmed.

IV. (1) The Tax Is Not a Privilege Tax Levied as Compensation for the Privilege of Using the Highways.

In all of the preceding topics we have constantly assumed that the tax herein was a privilege tax for the use of the highways. However, in reply to the appellant's effort to establish for the tax a character thus far assumed, we may show that the tax in question is actually not of the character which the Commissioner claims.

As a means of possibly foreclosing any consideration of the point by this Court, appellant urges that the Circuit Court of Appeals "held" this tax to be a privilege tax for the use of the highways. We submit that the Court did not pass upon such question at all, because it had no occasion to do so. The only reference in the matter in its opinion will be found at page 70 of the record. Of course, as the Court of Appeals says, this is a tax for "highway purposes," because the revenues are segregated for that purpose; but this would be equally true if the gasoline were taxed specifically as property and the revenue segregated for highway use. A tax merely for highway purposes is not at all the same thing as a tax levied as compensation for the use of the highways, which appellant *must* establish in this case, before he can bring his argument up to the point where *Interstate Transit, Inc., v. Lindsey* defeats it.

With respect to the case of *Sparling v. Refunding Board*, the Court of Appeals says:

> "The decision of that (the Arkansas) Court is controlling as to the *meaning and extent of the requirements of the taxing act.*" (Emphasis ours.)

The Court of Appeals merely gives effect to the accepted rule that the Federal Courts are bound by the decision of the highest State Court with respect to the interpretation or construction of State statutes. With this position we do not disagree.

But when the meaning and requirements of this Act, as defined by the Arkansas Supreme Court, are examined, it becomes clear that the Arkansas Court has so construed the statute as to be quite inconsistent with the only type of privilege tax which would help the appellant in this case.

We will not attempt to follow the Arkansas Court through the confusing language of its opinion, or to prove the very probable fact that it had in view no such purpose as the setting up of a "privilege tax as compensation for the privilege of using the highways." It will be sufficient here to show that the tax, as its meaning, extent and requirements are defined by the Arkansas Court, *cannot be that privilege tax levied on an interstate carrier as compensation for the privilege of using the roads*, which alone would suffice to bring the appellant face to face with the Lindsey case.

What the Arkansas Court has done is so to define the meaning and extent of the requirements of the Act 11 of 1934 as to set up for the State of Arkansas a *general*

privilege tax *upon all uses of gasoline within the State*—a tax which requires payment from every person using such gasoline, *without regard to the type of use and particularly without regard to whether such gasoline be used on the highways.* The tax is exacted from the users of stationary engines on remote levee jobs, from the users of farm machinery, and from the users of airplanes in flight; it is also to be exacted from the operators of cleaning plants in which gasoline is a cleaning agent, and from persons who may use it as fuel in kitchen stoves. No use whatever in the State is exempt. But, we submit, when the State of Arkansas, through its Supreme Court and its Revenue Department, actually does apply this tax to all uses of gasoline within the State, then in fact and law the Arkansas gasoline tax *is a general privilege tax upon all uses of gasoline in the State and cannot be that restricted form of tax here claimed by the Commissioner*, to-wit, a privilege tax levied as compensation for use of the highways. The tax cannot be both general and all-inclusive, and yet restricted to the only privilege for which an interstate carrier can be charged. Benefits from the two classes of tax, accruing to the State, are mutually exclusive; the State may impose the type of tax which will take the money of the industrial and non-highway user of gasoline but, because such a tax cannot possibly be defended as a tax levied as compensation for use of the highways, an interstate carrier does not pay it. The converse situation was open to the State; it could have passed a privilege tax for the privilege of using the highway, in which case the carrier would pay, with other highway users, but the industrial and non-highway users would escape. This case arises out of the unwillingness of the State to admit the limitations of its own accepted plan of taxation.

The appellant attempts to take this general privilege tax and, by the use of certain words of the Arkansas Court susceptible of more than one interpretation, to apply the general tax to an interstate carrier which, without those words, would be clearly exempt. The words in question do not purport to *change the nature* of this tax, which is *at all times applicable to all uses* of gasoline in Arkansas; they merely place a *characterization* or *"label"* on the tax, *misdescriptive of the goods.*

It is well established that this Court is not bound by any characterization of a tax on the part of the State Court but, for the purpose of determining and protecting the constitutional rights of the citizen, it will apply its own tests. The controlling test is to be found *in the operation and effect of the law as applied and enforced by the State.*

St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 50 L. Ed. 265, 35 Sup. Ct. 99;
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. Ed. 297, 43 Sup. Ct. 125;
Federal Land Bank of New Orleans v. Crosland, 261 U. S. 374, 67 L. Ed. 703, 43 Sup. Ct. 285.

The operation and effect of this gasoline tax statute, as applied and enforced by the State, is that of a general privilege tax on all uses of gasoline, not that of a statute levying mere compensation for the use of the highway. Under such conditions, this Court may, and we submit that it should, disregard any contrary characterization by the Arkansas Court, and give effect to the Act as it really is. If this be done, then the Act is not such as may be imposed upon this interstate carrier, the Helson case would apply directly to the situation.

(2) Act 67 of 1933 Is Not to Be Supported on the Ground of Necessity and Convenience.

Appellant says (A) that Act 67 of 1933 imposes no burden on the appellee, (B) that the inconvenience and expense shown do not amount to an unconstitutional burden, and (C) that the Act can be sustained as an easily administered aid in the enforcement of the tax.

In elaborating these points, appellant does not say that he assumes that Act 67 of 1933 would otherwise be unconstitutional insofar as it affects gasoline brought in for use on the roads of other states; but it appears that such an assumption must be made, otherwise there would be no reason for advancing this type of argument at all.

A. That Act 67 of 1933 does impose burdens on the appellee has already been demonstrated in the very beginning of this argument, under our first topic: the appellee can either (1) enter the State with not more than twenty gallons (which will not in any event suffice to carry the buses between Memphis and their termini and return, or between Memphis and the nearest storage in Missouri) and thereby face road stoppages and delays, or (2) enter with over twenty gallons and pay an illegal tax, or (3) be arrested and fined, with consequent expense and delay. We repeat and emphasize that it is not the burdens imposed by these statutes on the appellee which bring about the invalidity of this tax; it is the burdens imposed upon that interstate commerce in which appellee is engaged. And we wish at this point to further emphasize, as applicable to every argument made by appellant and involving the so-called "convenience" of the State as contrasted with the convenience of the ap-

pellee, that the supposed "convenience" to the State does not involve a corresponding inconvenience to this corporation alone. We do not have here the case of a carrier transporting inanimate freight, when this carrier of passengers is physically stopped, and financially penalized, and impeded in the course of its normal business by the revenue officials of the State of Arkansas, the unquestioned hardship to appellee itself *is multiplied by the personal inconvenience and expense of the many thousands of persons who are passengers on its buses.*

Suppose that the State of Arkansas undertook to levy a privilege tax on coal sold or used in the State and, as a "convenient" method of preventing the evasion of that tax, prohibited the introduction into the State of any coal on which the tax has not been paid. Then, when the State undertook to arrest and fine all railroads bringing coal into the State in engine tenders in the course of interstate commerce, unless the tax were paid, we would have (except for the one fact that the buses use a public highway) a case identical with that at bar; as a purely practical matter, and *from the point of view of "convenience" to the State and the hardship on the carrier and its passengers,* the cases would be fully identical. And it would be of great interest to observe the reactions of counsel for appellant (a member of the legal department of the Western Association of Railway Executives) should the State of Arkansas levy such a tax upon the fuel used by his employers in interstate commerce, and justify that otherwise baldly unlawful imposition on the ground that there was no burden on interstate commerce and no substantial hardship to the railroads in having their trains stopped and their passengers delayed, and, that even if there were, it was more "convenient" for the State to handle the matter that way.

With respect to that mathematical calculation by appellant, seeking to prove that the carrier can operate under the Commissioner's demands at less cost than under the finding of the Court of Appeals, we would reply that it is in no event incumbent upon appellee to pay an unlawful tax, whatever may be the financial outcome of refusal; and that the Company is probably a better judge of the practical handling of its business than is the appellant. The doing of those things, suggested by appellant to relieve the burden of the tax, is itself a burden.

B and C. When appellant claims that the inconvenience to be suffered by the appellee and its passengers is not enough to amount to an unconstitutional burden, and that Act 67 of 1933 (presumably otherwise invalid) can be independently sustained as an easily administered aid in the enforcement of the State gasoline tax, the authorities cited for the propositions do not go far enough to cover this case.

We suggest that this Court has never held that a tax, otherwise invalid, is to be held valid merely because convenient to the State. Presumably, mere inconvenience to the taxpayer will not invalidate a valid tax; but "convenience" to the State will not put life into a tax otherwise void. The first and essential inquiry is, whether the tax is valid; and it has herein been shown that the tax, as a tax, fails to meet any of the requirements of validity. Failure to recognize this proposition is an essential defect of the appellant's entire argument with regard to "convenience."

The appellant also overlooks the fundamental rule that, in the case of privilege taxes levied upon interstate car-

riers for the use of the roads, the State can collect only in reasonable degree for what it gives. Appellant argues that, because of "convenience," the State can meet one of two carriers making identical trips over the highway and, because one of those carriers has twenty-one gallons in its tank and the other has ninety, the State can tax one carrier 6½ cents and the other $4.50. This argument is equivalent to saying that, if the tax is void under the rule of the Lindsey case because there is no reasonable relation to the use, it nevertheless becomes valid merely because the State declares its method of taxation "convenient."

We suggest also that, if the State of Arkansas can support a tax on the mere ground of its own convenience, and can succeed in having this Court tell the carrier that it must adjust its normal business methods to suit that convenience, then every other State has the same right; with the obvious result that every State will be burdening interstate commerce, each in its own peculiar way, and in accordance with its individual policies, and without regard for the possibly conflicting policies and requirements of other states, and each will be claiming that the carrier shall so conduct his business as to meet the particular requirements of "convenience" promulgated by itself. We need scarcely elaborate the complete state of confusion that would result, or the enormous cumulative burdens which would thus be imposed on interstate commerce.

Cases of the type of Aero-Mayflower Transit Co. v. Georgia Public Service Commission are premised upon the existence of a valid tax. In that case itself, the State had simply imposed a flat fee on trucks, under which a

carrier could make such use of the highway, with the licensed truck, as it desired. The license fee itself was valid and reasonable; the operator complained that his business called for many trucks to enter the State and that under the tax as existing his tax bill was disproportionately large. This Court, in effect, told the operator that, if he wanted to get his tax bill down, he should so arrange it that fewer trucks would enter the State, because there was nothing wrong with the individual tax on each truck. This is far different from permitting the State to levy a tax on each truck, in an unknown and varying amount, every time the truck came into the State.

Even if we concede the general principle of "reasonable margin to insure effective enforcement," the facts of appellant's case certainly do not justify the application of the principle here. It would be hard to find or conceive of a more unreasonable, haphazard rule for determining a tax. Furthermore, the precise question in this case is, *can the State of Arkansas impose a tax upon gasoline being brought into the State in the tanks of an interstate carrier, in the course of an interstate journey, for use on the roads of other states;* and the answer to that question will control the fate of Act 67 of 1933. If it be decided that the State has no such legal power, any or all provisions of the Act of 1933 purporting to support or give effect to such power will necessarily be of no effect.

And in concluding the topic, appellant states that the authorities cited by him support the proposition that the State may base the tax upon the "reasonable lump sum" theory expressed in Act 67. Just what "reasonable lump sum" does he mean? The amount of the tax varies with every vehicle that enters the State, and varies with each vehicle at different times and places.

(3) The Circuit Court of Appeals Correctly Appraised and Applied the Case of Interstate Transit, Inc., v. Lindsey.

Appellant argues that Act 67 of 1933 does not impose any tax on gasoline carried through the State for use on the roads of other states. It merely prohibits the carrying of the gasoline to the scene of use *at all* unless the Arkansas tax is first paid. And, if it be seriously claimed that the State is purporting to tax all gasoline in the tank except the twenty gallons, which it graciously permits to be carried free for use on the roads of other states, then we ask what business has the State of Arkansas in limiting the amount of fuel that a carrier may bring into a sister state which has no objection to entrance with a full tank. Its action would be no less than an attempt by Arkansas to regulate transportation in such other state.

In applying the Lindsey case, the Circuit Court of Appeals first assumed everything contended for by appellant under Sparling v. Refunding Board. The Court did not, in its opinion, require any "nicety" in relation between the tax and the use of the highway; but it did require that there be *some* reasonable relation. It found none, for reasons too clear to need repeating. As a matter of fact, when appellant indicates that the fee required in the Lindsey case was a flat fee, he is in error; it was based on seating capacity and would vary with the size of the bus. Thus; it was actually more nearly related to the use of the highway than is the case here.

We have heretofore shown it to be perfectly possible and highly probable that, if all states are to be allowed

the privilege demanded by Arkansas of taxing all gasoline brought within their borders in the course of interstate commerce, the tax on such fuel will prove to be cumulative. Appellant says that this would not be true unless the "operator aggressively willed it to be so." Apparently, all the operator has to do, in order to "aggressively will it," is to carry enough gasoline in his tank to get his vehicle to its destination.

(4) Bingaman v. Golden Eagle Western Lines Is Not a Controlling Authority in This Case.

The Bingaman case really has no application here at all. The principles there laid down are all conceded by the appellee. We are not asking that the Court construe the meaning or define the extent of a state statute; although we are asserting that the Court is not bound by a mere characterization which is actually a misdescription of the nature of the Act. The state statute held void in the Bingaman case was almost identical with the Arkansas Act, which fact points our question—may a practically identical Act be constitutional in one state and unconstitutional in another, merely because of what the State Court *calls* that Act? And finally, the Bingaman case does not assist the appellant with respect to surmounting the requirements of Interstate Transit, Inc., v. Lindsey.

CONCLUSION

The case may be thus recapitulated:

1. The facts are undisputed and show that the demand of the Commissioner for this tax must necessarily result in expense to Company and public, or delay, inconvenience or danger to passengers, any one of which results in a direct burden to this interstate transportation.

2. As such a direct burden, the tax is invalid as in conflict with the Commerce Clause, unless it can be supported as a privilege tax levied only as compensation from the interstate carrier for its use of the state highways.

3. But, if purporting to be such a privilege tax, it is still invalid, because the tax thus imposed bears no reasonable relation to the use to be made of the highways.

4. And even if a valid tax and not in conflict with the Federal Constitution; the plain words of the statute itself restrict the tax to gasoline brought into the State for use in such State.

We need scarcely remind the Court of the extreme practical importance of the principle here at stake. If Arkansas can impose this tax on all gasoline brought into the State (and it does not have to grant the twenty gallon exemption), then every other state, and perhaps some cities, may do the same. A number of such statutes already exist; in Tennessee and Mississippi, to name two. If this power is established, it may be taken as certain that such exactions will multiply without limit, and

will constitute an unbearable nuisance and expense to all users of motor transportation.

It is submitted that the Circuit Court of Appeals was entirely correct in its action and in the reasons given for that action, and its decree should be affirmed.

Respectfully submitted,

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